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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 187.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED NOVEMBER 8, 1909.

(18,209.)

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(18,309.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1902.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES, Complainant and Appellee,
*vs.*
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2422.

*Citation.*

To the United States, Greeting:

The Oregon & California Railroad Company having, on this day, been granted an order of appeal to the United States circuit court of appeals for the ninth circuit, from the decree entered on June 15th, 1900, in suit No. 2,422 in the circuit court of the United States for the district of Oregon, brought by The United States as complainant against the said company; and the bond on appeal of the said company having been this day filed and approved:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit, at San Francisco, California, on September 3d, 1900, to show cause, if any there by, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, on August 11th, 1900.

CHARLES B. BELLINGER, *Judge.*

2 Due service admitted on August 11th, 1900.

JOHN H. HALL,
*United States Attorney, District of Oregon.*

Due service admitted Aug. 22, 1900.

CHAS. J. SCHNABEL,
*Attorney for Intervenors and Settlers.*

(Endorsed:) No. 2,422. United States circuit court of appeals, 9th circuit. United States *vs.* Oregon and California Railroad Co. Citation. United States circuit court. Filed Aug. 11, 1900. J. A. Sladen, clerk. District of Oregon. Wm. A. Fenton, Portland, Or., and Wm. Singer, Jr., N. E. corner Second and Mission streets, San Francisco, Cal., attorneys for appellant.

In the Circuit Court of the United States for the District of Oregon, October Term, 1897.

Be it remembered, that on the 3d day of November, 1897, there was duly filed in the circuit court of the United States for the district of Oregon, a bill of complaint, in words and figures as follows, to wit:

3 In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant.

*Bill of Complaint.*

To the honorable judges of the circuit court of the United States for the district of Oregon, sitting in equity:

The United States of America, by Joseph McKenna, its Attorney General, brings this its bill of complaint as against the above-named defendant, The Oregon & California Railroad Company, a corporation duly -corporated under and by virtue of the general laws of the State of Oregon, and a citizen of said State and district, and complaining says:

Par. 1. That the Congress of the United States by an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon," approved July 25, 1866, authorized such company, organized under the laws of Oregon, as the legislature of said State should thereafter designate, to construct a railroad and telegraph line within the State of Oregon, beginning at the city of Portland, and running thence through the Willamette,

4 Umpqua, and Rogue River valleys to the southern boundary of Oregon, there to connect with another railroad authorized in said act to be built in the State of California and granted to said Oregon Company every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, ten on each side of said railroad, and when any of said alternate sections or parts of sections shou-d be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid should be selected by said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections, and as soon as the company should file in the office of the Secretary of the Interior a map of survey of said railroad, or any portion thereof not less than sixty continuous miles from either terminus, the Secretary of the Interior should withdraw from sale public lands therein granted on each side of said railroad, so far as located and within the limits above specified; and your orator shows that by joint resolution adopted October 20, 1868, of the legislature of the State of Oregon, the Oregon Central Railroad Company was designated, in accordance with said last-mentioned act of Congress as capable of receiving and undertaking the privileges, franchises, grants, and duties above set forth, and did become the corporation entitled to all the benefits and subject to all the obligations of said

act of Congress, and that on or about April 4th, 1870, the said
5 Oregon & California Railroad Company, a corporation duly organized under the laws of Oregon, became the successor and assign of said Oregon Central Railroad Company.

Par. 2. And your orator would further show unto your honors that in the year 1870, the officers of the Oregon & California Railroad Company definitely fixed the line of said railroad authorized by said act of Congress, and filed a plat thereof in the office of the Commissioner of the General Land Office and presented the same to the then Secretary of the Interior, showing among other things, a route along the line authorized by said act of Congress, approved July 25, 1866, and the following-described, among other lands in the State of Oregon, were odd-numbered sections or parts of odd-numbered sections of public lands, not mineral, without the place limits and within the indemnity limits of said proposed line of railroad as designated by said map, viz: The east ½ of the S. W. ¼ and the west ½ of the S. E. ¼ of section 7, township 2, south, range 7 west of the Willamette meridian.

Par. 3. And your orator would further show unto your honors that the final plat and survey of township 2 south, range 7 west of the Willamette meridian, was filed in the district land office at Oregon City, Oregon, on the 27th day of July, 1893.

Par. 4. And your orator would further show unto your honors that all of the lands decribed in township 2 south, range 7 west of the Willamette meridian, were embraced by indemnity list No. 10 of selections of the Oregon & California Railroad Company,
6 which was approved by the district land officers, at Oregon City, Oregon, on the 27th day of July, 1893.

Par. 5. And your orator would further show unto your honors that on the 12th day of January, 1891, Joseph H. Elison, a duly qualified homestead entryman under the laws of the United States of America, settled upon the east ½ of the S. W. ¼ and the west ½ of the S. E. ¼ of section 7, township 2 south, range 7 west of the Willamette meridian, with the intention of homesteading the same, and ever since said 12th day of January, 1891, has continued to reside upon said land and cultivate and improve the same, and that within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office at Oregon City, Oregon, the said Joseph H. Elison in good faith made application for filing a homestead covering the said east ½ of the S. W. ¼ and the west ½ of the S. E. ¼ of section 7, township 2 south, range 7 west of the Willamette meridian, at the Oregon City land office in the State and district of Oregon.

Par. 6. And your orator would further show unto your honors that said indemnity list No. 10 of the selections made by the Oregon & California Railroad Company was duly presented to the General Land Office at the Capitol in Washington, and thereafter to the Secretary of the Interior, and that at the time of said presentation of said list at said General Land Office and to the said Secretary of the Interior, no knowledge of the adverse claim of Joseph H. Elison was known to said General Land Office or to said Secretary of the Interior; and there-

upon, and without any knowledge of the said adverse claim of
7 Joseph H. Elison, the said General Land Office and the said Secretary of the Interior in due form approved of said indemnity list of selections, and thereafter, on October 19th, 1895, a patent was duly issued to the Oregon & California Railroad Company for the following-described lands among other lands, to wit: The east ½ of the S. W. ¼, the west ½ of the S. E. ¼ of section 7, township 2 south, range 7 west of the Willamette meridian.

Par. 7. And your orator further avers that the ministerial officers of your orator acted erroneously and contrary to law in issuing patents for the lands named and described to said Oregon & California Railroad Company under the facts as herein stated; and so your orator avers that said patents, in so far as the same purport to convey title to the lands herein described to said Oregon & California Railroad Company, are null and void and should be so declared.

Par. 8. And your orator would further show unto your honors that it is informed and believes, and so charges the fact to be, that The Oregon & California Railroad Company, defendant herein, claims to be the owner in fee-simple of all the lands described herein, its claim of title being as follows, viz., a patent to it from the United States of America and that said Oregon & California Railroad Company claims possession of said lands and the title thereof in fee-simple. But your orator insists that said Oregon & California Railroad Company is chargeable with constructive notice of the several acts of Congress of the United States pleaded herein, and of the laws of the United States governing the disposal
8 thereof, and that under the acts of Congress and the laws relating to the disposal of public lands of the United States no title passed to said Oregon & California Railroad Company, and that said patents should be canceled.

Forasmuch, therefore, as your orator is without adequate remedy in a court of law, and to the end that the said defendant may, if it can, show why your orator should not have the relief herein prayed, and that the matters herein may be determined according to equity and good conscience, your orator brings this suit and prays that the patent purporting to convey title to said above-described lands may be set aside, canceled, and declared null and void. And your orator prays all other and proper relief in the premises.

And may it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this court, directed to the defendant, The Oregon & California Railroad Company, commanding said defendant on a certain day and under a certain penalty therein to be specified, personally to be and appear in this court, and then and there answer, but not under oath (answer under oath being hereby expressly waived), and to abide such order and decree as to your honors may seem proper.

JOSEPH McKENNA,
*Attorney General of the United States.*
DANIEL R. MURPHY,
*United States Attorney for Oregon.*
CHAS. J. SCHNABEL,
*Assistant United States Attorney.*

Filed November 3, 1897.

J. A. SLADEN,
*Clerk United States Circuit Court, District of Oregon.*

9 And afterward, to wit, on the 3d day of November, 1897, there was issued out of said court a *subpœna ad respondendum*, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.
In Equity.

THE UNITED STATES, Complainant,
*vs.*
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2422.

*Subpœna ad Respondendum.*

The President of the United States of America to The Oregon & California Railroad Company, Greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of December next, which will be the 6th day of December, A. D.
10 1897, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein The United States is complainant and you are defendant, and further to do and receive what our said circuit court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your deputy, to make due service of this our writ of subpœna, and to have then and there the same.

Hereof fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 3d day of November, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States, the one hundred and twenty-second.

[Seal of U. S. Circuit Court, District of Oregon.]

J. A. SLADEN, *Clerk.*

*Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States.*

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso*.

11 *Return to Subpœna ad Respondendum.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

I hereby certify that on the 3d day of November, 1897, at Portland, in said district, I duly served the within *subpœna ad respondendum*, upon the therein named, the Oregon & California Railroad Company, by delivering to R. Koehler, who is the second vice-president of the said company, personally, a true copy of said *subpœna ad respondendum*, duly certified to me as United States marshal, together with a copy of the complaint, in the within-entitled action, duly certified to by Daniel R. Murphy, United States attorney for said district.

HENRY C. GRADY,
*United States Marshal,*
By H. H. HENDERSON, *Deputy.*

(Endorsed:) No. 2,422. In the circuit court of the United States, for the district of Oregon. In equity. The United States, *vs.* The Oregon & California Railroad Company. *Subpœna ad respondendum.* Returned and filed. November 3, 1897. J. A. Sladen, clerk, United States circuit court, district of Oregon.

12 And afterward, to wit, on the 6th day of December, there was duly entered and filed in said court an appearance for the defendant herein, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
*vs.*
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2422.

*Præcipe for Appearance of Defendant.*

To the clerk of the above-entitled court:

You will please enter our appearance as solicitors in the above-entitled cause for the defendant, The Oregon & California Railroad Company.

W. D. FENTON.
E. C. BRONAUGH, JR
WM. T. MUIR.

Filed and entered Dec. 6, 1897.

J. A. SLADEN,
*Clerk United States Circuit Court, District of Oregon.*

13 And afterward, to wit, on the 31st day of December, 1897, there was duly filed in said court, a stipulation, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.
In Equity.

THE UNITED STATES
vs.
OREGON & CALIFORNIA RAILROAD Co. } No. 2422.

*Stipulation Extending Time for Defendant to Plead.*

It is hereby stipulated by and between the parties hereto that the defendant may have until the next February rule day within which to move or plead in the above-entitled case.

JOHN H. HALL,
*Attorney for the United States.*
WM. D. FENTON,
EARL C. BRONAUGH, JR.,
WM. T. MUIR,
*Attorneys for Defendant.*

Filed December 31, 1897.

J. A. SLADEN,
*Clerk United States Circuit Court, District of Oregon.*

14 And afterward, to wit, on Monday, the 3d day of January, 1898, the same being the 78th judicial day of the regular October, 1897, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD Co. } No. 2422. Jan. 3, 1898.

*Order Extending Time for Defendant to Plead.*

Now, at this day, comes the plaintiff herein by Mr. John H. Hall, United States attorney, and the defendant by Mr. W. D. Fenton, of counsel, and, thereupon, upon stipulation filed herein, and on motion of said defendant, it is ordered, that said defendant be, and it is hereby, allowed until the rule day in February next, 1898, in which to plead herein.

15 And afterward, to wit, on Tuesday, the 1st day of February, 1898, the same being the 103d judicial day of the regular October, 1897, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD CO. } No. 2422. Feb. 1, 1898.

*Order Extending Time for Defendant to Plead.*

Now, at this day, on motion of Mr. Charles J. Schnabel, assistant United States attorney, it is ordered, that the time heretofore allowed the defendant herein, in which to move, plead, or answer in this cause, be, and the same is hereby, extended to the rule day in April, 1898.

16 And afterward, to wit, on Friday, the 29th day of April, 1898, the same being the 17th judicial day of the regular April, 1898 term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2422. Apr. 29, 1898.

*Order Extending Time for Defendant to Plead.*

Now, at this day, comes the plaintiff by Mr. Charles J. Schnabel, assistant United States attorney, and the defendant by Mr. Wm. T. Muir, of counsel, and, thereupon on motion of said defendant, it is ordered, that said defendant be, and it is hereby, allowed sixty days from the rule day in May, 1898, in which to plead, answer or demur to the bill of complaint herein.

17 And afterward, to wit, on the 29th day of September, 1898, there was duly filed in said court, a petition of Joseph H. Elison, for leave to intervene herein, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.
In Equity.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2422.

*Petition of Joseph H. Elison for Leave to Intervene.*

To the honorable judges of the circuit court of the United States for the district of Oregon, sitting in equity:

Now comes your petitioner, Joseph H. Elison, and represents and shows to your honors that he is the same identical Joseph H. Elison

who is named in the bill of complaint in the above-entitled cause as the duly qualified homestead entryman, who, on the 12th day of January, 1891, settled upon the east half of the southwest quarter and the west half of the southeast quarter of section 7, township 2 south, of range 7 west of the Willamette meridian with the intention of homesteading the same, and who has ever since said date
18 continued to reside upon said land and cultivated and improved the same; that the facts set forth in the said bill of complaint in respect of all the matters and things pertaining to said tract of land are true; and, in addition thereto, your petitioner represents and shows to your honors that in conformity with the act of Congress of March 3, 1887, applicable to said cause the Secretary of the Interior on or about the — day of —— 1895 made demand upon The Oregon & California Railroad Company, defendants above named, demanding that it execute in due form a relinquishment or reconveyance to the United States of the tract of land aforesaid, on the ground that the patent which had theretofore been issued by the ministerial officers of the United States to said Oregon & California Railroad Company of said tract of land was illegal and void for the reasons set forth in said bill of complaint; and from and ever since said time said company has neglected and failed to reconvey said land to the United States.

Your petitioner therefore prays your honors that he may be permitted to intervene in the above-entitled cause for the several purposes set forth in said bill of complaint in his own behalf, and for such other and further relief as to your honors may seem just and equitable in the premises.

W. W. THAYER,
HENRY ST. RAYNER, AND
CHAS. J. SCHNABEL,
*Solicitors and Attorneys for said Petitioners.*

19 UNITED STATES OF AMERICA, }
*State and District of Oregon, County of Multnomah,* } ss:

I, Chas. J. Schnabel, being first duly sworn, depose and say that I am one of the attorneys for petitioner, Joseph H. Elison, named in the foregoing petition, that all of the material allegations set forth in the foregoing petition are within my personal knowledge and believe them to be true, that the reason I make this verification is that said petitioner is not now within the county of Multnomah, Oregon.

CHAS. J. SCHNABEL.

Subscribed and sworn to before me this 29th day of September, 1898.

[SEAL.]

W. D. FREEMAN,
*Notary Public for Oregon.*

UNITED STATES OF AMERICA,
*State and District of Oregon, County of Multnomah,* } ss:

I, Chas. J. Schnabel, being first duly sworn, say that I am one of the attorneys for the petitioner herein, to wit, Joseph H. Elison; that I served a copy of the petition of said Elison hereto attached, on The United States, plaintiff herein and a copy thereof on The Oregon & California Railroad Co., defendant herein, by handing and leaving with Mr. Edwin Mays, assistant United States attorney for
20 the district of Oregon, at his office in the Federal building, Portland, Oregon, a duly certified copy thereof, and by leaving with and handing to W. D. Fenton, one of the attorneys and solicitors of said defendant, a like copy thereof at his office in the Chamber of Commerce building, Portland, Oregon; that said copies of the petition aforesaid so served on said Mays and Fenton was in each instance a full, true and correct copy of said petition and of the whole thereof and service made as aforesaid were made between the hours of 1.45 p. m. and 2.30 p. m. of the 29th day of September, 1898.

CHAS. J. SCHNABEL.

Subscribed and sworn to before me this 29th day of September, 1898.

[SEAL.] W. D. FREEMAN,
*Notary Public for Oregon.*

Filed September 29, 1898.

J. A. SLADEN, *Clerk.*

And afterward, to wit, on Monday, the 21st day of November, 1898, the same being the 41st judicial day of the regular October, 1898, term of said court—present the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

21 In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
*vs.*
OREGON & CALIFORNIA RAILROAD CO. } No. 2422. November 21, 1898.

*Order Allowing Plaintiff to File Amended Bill of Complaint.*

Now, at this day, on motion of Mr. John H. Hall, United States attorney, it is ordered that the plaintiff herein be, and it is hereby, allowed to file an amended bill of complaint in this cause.

And afterward, to wit, on the 21st day of November, 1898, there was duly filed in said court, an amended bill of complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant.

*Amended Bill of Complaint.*

To the honorable judges of the circuit court of the United States for the district of Oregon, sitting in equity:

22 The United States of America, by John W. Griggs its Attorney General, brings this its amended bill of complaint (leave of the court first being obtained), as against the above-named defendant, The Oregon & California Railroad Company, a corporation duly incorporated under and by virtue of the general laws of the State of Oregon, and a citizen of said State and District, and complaining says:

I.

That the Congress of the United States by an act entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, State of Oregon," approved May the 4th, 1870, for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville, in the State of Oregon, granted to the Oregon Central Railroad Company, a corporation organized under the laws of the State of Oregon, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depot stations, side tracks, and other needful uses in operating the road, not exceeding forty acres at any one place, and also each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead
23 right at the time of the passage of this act; and further provides that in case the quantity of ten full sections per mile cannot be found on each side of said road within the said limits of twenty miles, other lands designated as aforesaid should be selected under the direction of the Secretary of the Interior upon either side of any part of said road nearest to, but not more than twenty-five miles from, the track of said road to make up such deficiency.

II.

That section 2 of said act further provides that the Commissioners of the General Land Office should cause the lands along the line of the railroad to be surveyed with all convenient speed. And when-

ever, and as often as said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary should cause the said granted lands adjacent to and cotermin-us with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands subject to sale within the limits of the said grant should be disposed of only to actual settlers at double the minimum price for such lands.

III.

Section 3 further provides that whenever, and as often as the said company should complete and equip twenty or more consecutive miles of the said railroad and telegraph line, the Secretary of the Interior should cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class
24 railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and cotermi-n-us with the said completed sections.

IV.

Section 6 thereof further provides that the said company should file with the Secretary of the Interior its assent to said act within one year from the time of its passage; and that the said grant is upon the condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years from the same date.

V.

And your orator would further show unto your honors that on the — day of ——, 1871, the officers of the said Oregon Central Railroad Company filed with the Secretary of the Interior its assent to said act; and your orator would further show, that upon the 16th day of February, 1872, the said Oregon Central Railroad Company completed the first section of twenty miles from the city of Portland to a point near the town of Forest Grove; and that on the 23d day of June, 1876, the said Oregon Central Railroad Company completed said road to the Yamhill river, near McMinnville, as provided in said act, but that neither the Oregon Central Railroad Company nor its successors or assigns ever constructed or completed said line of railroad to the city of Astoria, within the State of Oregon, or any part thereof.

25 VI.

And your orator would further show unto your honors that the said Oregon Central Railroad Company, on the 6th day of October, 1880, sold and transferred to The Oregon & California Railroad Company, defendant above named, all of its right, title and interest in and to the lands and rights of way accruing to it by virtue of the

said grant of Congress hereinbefore set forth; and the said Oregon & California Railroad Company ever since said time have been and now are the owners and holders of said interests, whatever they may be.

VII.

And your orator would further show unto your honors that the following-described among other lands in the State of Oregon were odd-numbered sections, and parts of odd-numbered sections of public lands, not mineral, without the place limits, and within the indemnity limits of said grant, to wit, the east half of the southwest quarter, and the east half of the southeast quarter, section 7, township 2 south, range 7 west of the Willamette meridian.

VIII.

And your orator would further show unto your honors that the final plat and survey of township 2 south, range 7 west of the Willamette meridian was filed in the district land office at Oregon City, Oregon, on the 27th day of July, 1893.

IX.

And your orator would further show unto your honors
26 that all of the lands described in township 2 south, range 7 west of the Willamette meridian were embraced by indemnity list No. 10 of selections of the Oregon & California Railroad Company, which was approved by the district land officers at Oregon City, Oregon, on the 27th day of July, 1893.

X.

And your orator would further show unto your honors that on the 12th day of January, 1891, Joseph H. Elison, a duly qualified homestead entryman under the laws of the United States of America, settled upon the east half of the southwest quarter and the west half of the southeast quarter of section 7, township 2 south, range 7 west, of the Willamette meridian, with the intention of homesteading the same, and ever since said 12th day of January, 1891, has continued to reside upon said land and cultivated and improved the same, and that within ninety days from the date of the filing of the township plat of the survey of said lands in the district land office at Oregon City, Oregon, the said Joseph H. Elison in good faith made application for filing a homestead covering the said east half of the southwest quarter and the west half of the southeast quarter of section 7, township 2 south, range 7 west of the Willamette meridian, at the Oregon City land office in the State and district of Oregon.

XI.

And your orator would further show unto your honors that said indemnity list No. 10 of the selections made by the Oregon & California Railroad Company was duly presented to the General Land

Office at the Capitol at Washington, and thereafter to the Sec-
27 retary of the Interior, and that at the time of said presentation of said list at said General Land Office and to the said Secretary of the Interior, no knowledge of the adverse claim of Joseph H. Elison was known to said General Land Office or to said Secretary of the Interior; and thereupon, and without any knowledge of the said adverse claim of Joseph H. Elison, the said General Land Office and the said Secretary of the Interior in due form approved of said indemnity list of selections, and thereafter, on October 19th, 1895, a patent was duly issued to the Oregon & California Railroad Company for the following-described lands among other lands, to wit: The east half of the southwest quarter, the west half of the southeast quarter of section 7, township 2 south, range 7 west of the Willamette meridian.

XII.

And your orator further avers that the ministerial officers of your orator acted erroneously and contrary to law in issuing patents for the lands named and described to said Oregon & California Railroad Company under the facts as herein stated; and so your orator avers that said patents, in so far as the same purport to convey title to the lands herein described to said Oregon & California Railroad Company, are null and void and should be so declared.

XIII.

And your orator would further show unto your honors that it is informed and believes and so charges the fact to be, that The Oregon & California Railroad Company, defendant herein, claims to be the owner in fee-simple of all the lands described herein, its claim
28 of title being as follows, viz., a patent to it from the United States of America, and that said Oregon & California Railroad Company claims possession of said lands and the title thereof in fee-simple. But your orator insists that said Oregon & California Railroad Company is chargeable with constructive notice of the several acts of Congress of the United States pleaded herein, and of the laws of the United States governing the disposal thereof, and that under the acts of Congress and the laws relating to the disposal of public lands of the United States, no title passed to said Oregon & California Railroad Company, and that said patents should be canceled.

Forasmuch, therefore, as your orator is without adequate remedy in a court of law, and to the end that said defendant may, if it can, show why your orator should not have the relief herein prayed, and that the matters herein may be determined according to equity and good conscience, your orator brings this suit and prays that the patent purporting to convey title to said above-described lands may be set aside, canceled, and declared null and void. And your orator prays all other and proper relief in the premises.

And may it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this court, directed to the defendant The Oregon & California Railroad Company, com-

manding said defendant on a certain day and under a certain penalty therein to be specified, personally to be and appear in this court and then and there to answer, but not under oath (answer under oath being hereby expressly waived), and to abide such order and
29 decree as to your honors may seem proper.

JOHN W. GRIGGS,
*Attorney General of the United States.*
JOHN H. HALL,
*United States Attorney for Oregon.*

Due service of the within amended complaint is hereby accepted at Portland, Oregon, this 21st day of November, 1898.

WM. D. FENTON,
*Of Attorneys for Defendant.*

Filed November 21, 1898.

J. A. SLADEN,
*Clerk U. S. Circuit Court, District of Oregon.*

And afterward, to wit, on the 29th day of November, 1898, there was duly filed in said court a stipulation of the parties hereto, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES, Plaintiff,
*vs.*
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2422.

*Stipulation Allowing Defendant Time to Plead to Amended Bill of Complaint.*

It is hereby stipulated by and between plaintiff and de-
30 fendant above named by their respective attorneys that the defendant may have until the rule day in January next, in which to plead to the amended bill of complaint filed and served herein.

JOHN H. HALL, *United States Attorney.*
FENTON, BRONAUGH & MUIR,
*Attorneys for Defendant.*

Filed November 29, 1898.

J. A. SLADEN,
*Clerk U. S. Circuit Court, District of Oregon.*

And afterward, to wit, on the 30th day of December, 1898, there was duly filed in said court a plea of the defendant to the amended bill of complaint herein, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Oregon.

UNITED STATES, Complainant,
*vs.*
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2422.

*Plea of Defendant to Amended Bill of Complaint.*

Plea of the defendant, Oregon & California Railroad Company, to the amended bill of complaint of the complainant.

31 This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said amended bill of complaint set forth to be true, in such manner or form as the same are therein stated or alleged, for plea to the whole of the said amended bill of complaint, says:

On May 17th, 1871, the Secretary of the Interior accepted and approved the Oregon Central Railroad Company's maps of the survey and location of the railroad from Portland by way of Forest Grove to McMinnville, referred to in paragraph V of the amended bill; and on July 14th, 1871, the Secretary of the Interior withdrew the land described in paragraph VII of the amended bill from the mass of public lands, and for the benefit of the land grant set forth in the amended bill.

The said company constructed and equipped its railroad from Portland by way of Forest Grove to McMinnville, 47.5 miles in length, along the line shown upon the maps hereinbefore mentioned, and three commissioners, appointed by the Secretary of the Interior for that purpose, examined the said railroad and reported the same to the Secretary of the Interior to be a first-class railroad, properly equipped and ready for use; and the Secretary of the Interior accepted and approved the said reports and railroad, on February 16th, 1872, as to the portion of railroad extending from Portland to Forest Grove, and on June 23d, 1876, as to the portion of railroad extending from Forest Grove to McMinnville.

At the time the land grant set forth in paragraph I of the amended bill was made, and continuously since, all the odd sections
32 within twenty-five miles of the said railroad from Portland to McMinnville, undisposed of by the United States prior to the date of said granting act, were and have been insufficient to make, or equal, the amount of lands granted by the said act.

The United States has at all times prior to July 27th 1893, neglected to survey the land described in paragraph VII of the amended bill, and refused to permit the Oregon Central Railroad Company or this defendant to select the same before survey; notwithstanding the said Oregon Central Railroad Company and this defendant have continuously demanded the survey and patenting thereof at all times since the railroad from Portland to McMinnville was accepted as aforesaid, and would have selected the same, as this defendant did, as soon as surveyed.

All of which matters and things this defendant avers to be true and pleads to the complainant's amended bill; and prays the judgment of this honorable court whether it ought to make any other or further answer to the said amended bill; and asks to be hence dismissed with its costs and charges in this behalf, most wrongfully sustained.

WM. D. FENTON AND
WM. SINGER, JR.,
*Attorneys for the Defendant.*

WM. F. HERRIN,
*Counsel for the Defendant.*

STATE OF OREGON,
*County of Multnomah,* } *ss:*

I, George H. Andrews, make solemn oath that *he is* the
33 secretary of the defendant Oregon & California Railroad Company; that foregoing plea is true in point of fact, and not interposed for delay.

GEO. H. ANDREWS.

Subscribed and sworn to before me on December 28th, 1898.

[SEAL.]

WM. D. FENTON,
*Notary Public in and for Multnomah County, Oregon.*

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

WM. F. HERRIN,
*Counsel for the Defendant.*

DISTRICT OF OREGON,
*County of Multnomah,* } *ss:*

Due service of the within plea is hereby accepted in Multnomah county, Oregon, this 30th day of December, 1898, by receiving a copy thereof, duly certified to by Wm. D. Fenton, of attorneys for defendant.

JOHN H. HALL,
*Attorney for Plaintiff.*

Filed December 30, 1898.

J. A. SLADEN,
*Clerk U. S. Circuit Court, District of Oregon.*

And afterward, to wit, on Thursday, the 2d day of February, 1899, the same being the 104th judicial day of the regular October, 1898, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

34 In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
*vs.*
THE OREGON & CALIFORNIA RAILROAD CO. } No. 2422. February 2, 1899.

*Order Setting Plea to Amended Bill of Complaint for Hearing.*

Now, at this day, on motion of Mr. John H. Hall, United States attorney, it is ordered that the hearing of this cause upon the plea to the amended bill herein be, and it is hereby, set for Monday, the 6th day of March, 1899.

And afterward, to wit, on Friday, the 3d day of March, 1899, the same being the 126th judicial day of the regular October, 1898, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
*vs.*
OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2422. March 3, 1899.

*Order Setting Plea to Amended Bill of Complaint for Hearing.*

Now, at this day, comes the plaintiff herein by Mr. John H.
35 Hall, United States attorney, and the defendant by Mr. Wm. T. Muir, of counsel, and thereupon, on motion of said plaintiff, it is ordered that the hearing of this cause upon the plea of the defendant herein to the amended bill of complaint, be, and it is hereby, set for Monday, May 15, 1899.

And afterward, to wit, on Monday, the 15th day of May, 1899, the same being the 30th judicial day of the regular April, 1899, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
*vs.*
THE OREGON & CALIFORNIA RAILROAD CO. } No. 2422. May 15, 1899.

*Record of Hearing on Plea to Amended Bill and Order Allowing Time to File Briefs.*

Now, at this day, comes the plaintiff herein by Mr. John H. Hall, United States attorney, and the defendant by Mr. J. S. Moseby, who,

on motion of said United States attorney is permitted to appear for said defendant in this cause, and Mr. W. D. Fenton, of counsel, and, thereupon, this cause comes on to be heard upon the plea of said defendant to the bill of complaint herein, and also appears for certain settlers upon the lands referred to in said bill of
36 complaint, Mr. W. W. Thayer, Mr. Henry St. Raynor, and Mr. Charles J. Schnabel, of counsel, and the court, having heard the arguments of counsel will advise thereof.

And thereupon it is ordered that the counsel for the respective parties hereto be, and they are hereby, allowed sixty days from this date in which to file their briefs herein.

And afterward, to wit, on Thursday, the 31st day of August, 1899, the same being the 121st judicial day of the regular April, 1899, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
*vs.*
THE OREGON & CALIFORNIA RAILroad Company. } No. 2422. August 31, 1899.

*Order Extending Time to File Briefs.*

Now, at this day, on motion of Mr. Wm. T. Muir, of counsel for the defendant herein, and upon stipulation of the parties hereto, filed in cause No. 2,272, entitled as above, it is ordered that said defendant be, and it is hereby, allowed until and including Monday, September 18, 1899, in which to file its brief herein.

37 And afterward, to wit, on Friday, the 27th day of April, 1900, the same being the 16th judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
*vs.*
OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2422. April 27, 1900.

*Order Overruling Plea and Allowing Time to Further Plead.*

This cause was heard upon the plea of the above-named defendant to the bill of complaint herein, and was argued by Mr. John H. Hall, United States attorney, of counsel for the plaintiff, and by Mr. W. D. Fenton and Mr. John S. Moseby, of counsel for the defendant,

whereupon the court took the same under advisement, and having duly considered the same, it is ordered and adjudged that said plea be, and the same is hereby, overruled;

And it is further ordered, that said defendant be, and it is hereby allowed ten days from this date in which to further plead or move herein.

38 And afterward, to wit, on Monday, the 7th day of May, 1900, the same being the 24th judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2422. May 7, 1900.

*Order Extending Time to Further Plead.*

Now, at this day, comes the plaintiff herein by Mr. John H. Hall, United States attorney, and the defendant by Mr. W. D. Fenton, of counsel, and thereupon, on motion of said defendant, it is ordered that the time heretofore allowed said defendant in which to further move *to* plead herein be, and the same hereby is, extended ten days.

And afterward, to wit, on Thursday, the 17th day of May, 1900, the same being the 32d judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

39 In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2422. May 17, 1900.

*Order Extending Time to Further Plead.*

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the above-named defendant, it is ordered that the time heretofore allowed said defendant in which to further move or plead herein be, and the same is hereby, further extended ten days.

And afterward, to wit, on Monday, the 28th day of May, 1900, the same being the 42d judicial day of the regular April, 1900,

term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2422. May 28, 1900.

*Order Extending Time to Further Plead.*

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendant herein, it is ordered that the time heretofore
40 allowed said defendant in which to further move or plead herein be, and the same is hereby, further extended ten days.

And afterward, to wit, on Friday, the 15th day of June, 1900, the same being the 58th judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2422. June 15, 1900.

*Final Decree.*

This cause was heard by the court upon the sufficiency of the defendant's plea to the bill of complaint in this cause, heretofore
41 filed herein, and was argued by Mr. John H. Hall, United States attorney, and by Mr. John S. Moseby and Mr. W. D. Fenton, of counsel for the above-named defendant, and the court having taken the same under advisement, and, on the 27th day of April, 1900, having overruled said plea, and the defendant having declined to further plead herein, and after examination of the facts set forth in the plaintiff's bill of complaint, and upon motion of Mr. John H. Hall, United States attorney, it is ordered, adjudged, and decreed that the patent issued by the President of the United States upon the 19th day of October, 1895, to the defendant, The Oregon & California Railroad Company to the following-described lands, to wit: the east ½ of the southwest ¼, the west ½ of the southeast ¼, of section 7, township 2 south, of range 7, west of the Willamette meridian, be, and the same is hereby, set aside, and decreed to be null and void and of no effect, and the legal title to said lands is hereby vested in the United States, and that plaintiff have and re-

cover, of and from the defendant, its costs and disbursements of this suit taxed at $—.

CHARLES B. BELLINGER, *Judge.*

Filed June 15, 1900.

J. A. SLADEN,
*Clerk U. S. Circuit Court, District of Oregon.*

42 And afterward, to wit, on the 11th day of August, 1900, there was duly filed in said court a petition for the allowance of an appeal and supersedeas, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
*vs.*
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2422.

*Petition for Allowance of Appeal and Supersedeas.*

The defendant in the above-entitled suit, conceiving itself aggrieved by the decree made and entered herein on June 15th, 1900, granting unto the complainant the relief prayed for in its bill of complaint, hereby appeals from the said decree to the United States circuit court of appeals for the ninth circuit; and the defendant, files herewith its assignment of errors asserted and intended to be urged on appeal.

The defendant prays an order of this court allowing its appeal, and directing that transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit; and that by the order of this court all further proceedings in
43 this case, and upon said decree, may be stayed pending this appeal, upon its (defendant's) giving a good and sufficient bond to be approved by this court.

Dated and signed on August 11th, 1900.

WM. D. FENTON AND
WM. SINGER, JR.,
*Attorneys for Defendant.*

WM. F. HERRIN,
*Counsel for Defendant.*

Filed August 11, 1900.

J. A. SLADEN,
*Clerk U. S. Circuit Court, District of Oregon.*

And afterward, to wit, on the 11th day of August, 1900, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
*vs.*
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2422.

*Assignment of Errors.*

In connection with its petition for allowance of appeal herein, the defendant makes and files this assignment of errors made by the court, in its decree entered in this cause on June 15th, 1900.

44 The complainant's amended bill, and the defendant's plea, taken together, show the land in suit properly patented to the defendant, unless issue of the patent was unlawful because of the settlement, occupancy, and homestead filing of Joseph H. Elison, set forth in subdivision X of the amended bill. In adjudging and decreeing the defendant's patent null, void, set aside and canceled, and title to the lands thereof restored to the United States, the court erred as follows:

1st. Because, as shown by the amended bill, the defendant is the owner of such interest in the land in suit as was granted to the Oregon Central Railroad Company by the act of Congress approved May 4th, 1870; which act granted *in præsenti*, and immediately transferred unto the Oregon Central Railroad Company, a vested right to select the lands in suit, under direction of the Secretary of the Interior, in part satisfaction of the amount of land granted. As shown by the amended bill, the settlement of Elison was initiated in January, 1891, and his offer to file a homestead for the land was made within ninety days after July 27th, 1893; both of which dates are long subsequent to the passage of defendant's granting act, definite location, construction, and acceptance of defendant's railroad.

2d. Because, as shown by the plea, the Oregon Central Railroad Company's map of the survey and final location of its railroad, was duly accepted and approved by the Secretary of the Interior on May 17th, 1871. Thereupon, on that day, the lands in suit were, by the terms and provisions of the said act, segregated from the public lands, and have ever since so remained; hence the said lands

45 were not public lands, nor subject to settlement by Elison in January, 1891, nor to homestead filing by him thereafter.

3d. Because, as shown by the plea, at the time the defendant's land grant was made, and continuously since, all the odd sections of land within twenty-five miles of the defendant's railroad, undisposed of by the United States prior to the date of the said granting act, were and have been insufficient to make, or equal, the amount of lands granted. The lands in suit were, therefore, granted by the force and effect of the said act, without any selection thereof being required; hence the land in suit was not public lands, nor subject to the settlement, or filing of Elison.

4th. Because the said act provided that the lands in suit should be surveyed with all convenient speed, and patented as soon as the first twenty miles of the defendant's railroad was constructed and approved by the commissioners. The plea shows that the section of road coterminous with the land in suit was finally approved on February 16th, 1872; that the defendant thereupon, and continuously thereafter, demanded survey and patent; that the United States refused to permit selection of or issue patent for this land until after survey thereof; that the defendant would have selected the land on February 16th, 1872, if surveyed, or on the day of survey thereafter; but that the United States neglected and refused to survey or patent the land, or permit defendant to select the same, until July 27th, 1893. For these reasons it would be inequitable to restore to the United States title to the land in suit; as but
46 for fault of the United States the defendant's patent would have issued long before Elison settled, or offered to file.

5th. Because, as shown by the bill, defendant's selection of the land in suit was filed and approved by the proper officers of the United States, on July 27th, 1893; hence Elison's filing, tendered thereafter, could not be lawfully received.

6th. Because, as shown by the bill and plea, the United States has no such interest in the relief prayed for, or given by the decree, as will maintain this suit, or sustain the decree.

7th. Because, as shown by the bill and plea, the decree should have been for defendant as prayed, with costs.

Wherefore, the defendant (appellant) prays that the decree herein be reversed, that the complainant's bill he dismissed, and that it (defendant) be given the relief prayed.

WM. D. FENTON AND
WM. SINGER, JR.,
*Attorneys for the Defendant.*

WM. F. HERRIN,
*Counsel for the Defendant.*

Filed August 11, 1900.

J. A. SLADEN,
*Clerk U. S. Circuit Court, District of Oregon.*

And afterward, to wit, on Saturday, the 11th day of August, 1900, the same being the 106th judicial day of the regular April, 1900, term of said court—present: the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

47 In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
*vs.*
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2422.

*Order Granting Appeal and Supersedeas.*

Having considered the defendant's petition for the allowance of appeal and supersedeas from the decree made and entered herein on June 15th, 1900, and the assignment of errors filed therewith, on motion of Mr. Wm. D. Fenton, of counsel for the defendant, the appeal of the defendant is allowed as prayed, upon giving a bond to be approved by this court, in the sum of five hundred dollars, which bond shall operate as a supersedeas from the date of its approval.

And it is further ordered that a transcript of the record, proceedings, and papers upon which the said decree was made, duly authenticated, be sent by the clerk of this court, to the United States circuit court of appeals, ninth circuit, at San Francisco, California.

Dated and signed on August 11th, 1900.

CHARLES B. BELLINGER, *Judge.*

Filed August 11th, 1900.

J. A. SLADEN,
*Clerk U. S. Circuit Court, District of Oregon.*

48 And afterward, to wit, on the 13th day of August, 1900, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
*vs.*
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2422.

*Bond on Appeal.*

We, R. Koehler and C. G. Sutherland, each of Portland, Oregon, are held and firmly bound unto The United States, complainant above named, in the sum of five hundred dollars, to be paid unto the said complainant; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. The Oregon & California Railroad Company, defendant above named, has been allowed an appeal to
49 the United States circuit court of appeals for the ninth circuit, and supersedeas, from the decree entered in the above-entitled

suit on June 15th, 1900; and the condition of this obligation is, that if the said Oregon & California Railroad Company shall prosecute its appeal to effect, and answer the costs taxed in the decree appealed from, together with all damages, interest, and cost of such appeal and supersedeas, if it (defendant) fails to make its said appeal good, thence this obligation to be void, otherwise to remain in full force.

Dated and signed on August 11th, 1900.

R. KOEHLER. [SEAL.]
C. G. SUTHERLAND. [SEAL.]

STATE OF OREGON, } ss:
*County of Multnomah,* }

R. Koehler and C. G. Sutherland, being duly sworn, each for himself says: I am one of the sureties to the foregoing bond, and subscribed my name thereto. I am a resident of, and freeholder within, the State and district of Oregon, and am worth the sum of five hundred dollars, over and above all my just debts and liabilities, in property situated in said district, exclusive of property exempt from execution.

R. KOEHLER.
C. G. SUTHERLAND.

Subscribed and sworn to before me on August 11, 1900.
[SEAL.] DAVID LORING,
*Notary Public in and for Multnomah County, Oregon.*

The foregoing bond approved on August 13th, 1900.

CHARLES B. BELLINGER, *Judge.*

Filed August 13, 1900.

J. A. SLADEN,
*Clerk U. S. Circuit Court, District of Oregon.*

*Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

I, J. A. Sladen, clerk of the circuit court of the United States, for the district of Oregon, in obedience to the foregoing order allowing appeal, do hereby certify that the foregoing pages, numbered from 3 to 70, inclusive, contain a full, true, and correct transcript of the record and proceedings had in said court, in cause No. 2,422, The United States, plaintiff, against The Oregon and California Railroad Company, defendant and appellant, as the same appear at my office and in my custody.

And I further certify that the cost of the foregoing transcript is twenty-six and $\frac{00}{100}$ dollars, and that the same has been paid by the appellant, The Oregon and California Railroad Company.

51 In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, at Portland, in said district, this 30th day of August, 1900.

[SEAL.] J. A. SLADEN, *Clerk.*

(Endorsed:) No. 639. Transcript of record. In the United States circuit court of appeals, for the ninth circuit. The Oregon and California Railroad Company, appellant, *vs.* The United States, appellee. Appealed from the circuit court of the United States for the district of Oregon. Filed September 1st, 1900. F. D. Monckton, clerk.

52 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
*vs.*
THE UNITED STATES, Appellee. } No. 641.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
*vs.*
THE UNITED STATES, Appellee. } No. 639.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
*vs.*
THE UNITED STATES, Appellee. } No. 640.

Appeals from the circuit court of the United States for the district of Oregon.

Before Ross and Morrow, circuit judges, and Hawley, district judge.

THE COURT:

On the authority of Hewitt *v.* Schultz, Supreme Court Reporter, February 15, 1901, p. 309: Grinnell *v.* R. R. Co., 103 U. S. 739: St. Paul etc. R. R. Co., *v.* Winona etc. R. R., 112 U. S. 720: Sioux City etc. R. R. *v.* Chicago, Milwaukee etc. R. R., 117 U. S. 406; U. S. *v.* Missouri, Kansas & Texas R. R., 141 U. S. 374, the judgment in each of the above-entitled cases is affirmed.

(Endorsed:) Opinion. Filed May 16, 1901, F. D. Monckton, clerk.

53 United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
*v.*
THE UNITED STATES, Appellee.
} No. 639. Decree.

Appeal from the circuit court of the United States for the district of Oregon.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Oregon, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Decree. Filed and entered May 16, 1901, F. D. Monckton, clerk.

54 At a stated term, to wit: the October term A. D. 1901 of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday the 9th day of October in the year of our Lord one thousand, nine hundred and one.

Present: Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
*v.*
THE UNITED STATES, Appellee.
} No. 639.

Upon motion of William Singer, Jr., Esquire, counsel for the appellant, it is ordered that an appeal to the Supreme Court of the United States be and the same is hereby allowed; and that the amount of bond on appeal be and the same is hereby fixed in the sum of $300.

55 In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant,
*vs.*
UNITED STATES, Complainant and Appellee.
} No. 639. In Equity.

*Petition for Appeal.*

The above-named defendant, conceiving itself aggrieved by the decree made and entered herein on May 16th 1901, appeals therefrom to the Supreme Court of the United States, for the reasons

specified in its assignment of errors filed herewith; and the defendant prays that its appeal may be allowed, and that a transcript of the record, proceedings and papers upon which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioner further prays, that upon giving a good and sufficient bond to be approved by this court, all proceedings in this cause, and upon the said decree, may be stayed pending its appeal.

WM. D. FENTON &
WM. SINGER, JR.,
*Attorneys for the Defendant.*

WM. F. HERRIN,
*Counsel for the Defendant.*

56 *Order Allowing Appeal.*

The foregoing claim of appeal, and prayer for supersedeas, are allowed and granted; the supersedeas to take effect upon the filing of a good and sufficient bond in the sum of five hundred dollars, conditioned that the appellant shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its appeal good.

It is further ordered that a transcript of the record, proceedings and papers upon which the said decree was made, under the seal of this court and the hand of its clerk, be sent to the Supreme Court of the United States.

San Francisco, October 15th, 1901.

WM. W. MORROW,
*Circuit Judge.*

(Endorsed:) Petition for appeal and order allowing appeal. Filed October 16, 1901, F. D. Monckton, clerk.

57 In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant,
*vs.*
UNITED STATES, Complainant and Appellee. } No. 639. In Equity.

*Assignment of Errors.*

The above-named defendant, by the undersigned, its attorneys and counsel, in connection with its petition for allowance of appeal herein, says that the decree in the above-entitled cause, made and entered on May 16th 1901, is erroneous and against its just rights in the following particulars; that is to say:

The complainant's amended bill, and the defendant's plea, taken together, show the land in suit properly patented to the defendant, unless issue of the patent was unlawful because of the settlement, occupancy, and homestead filing of Joseph H. Elison, set forth in subdivision X of the amended bill. In adjudging and decreeing

the defendant's patent null, void, set aside and canceled, and title to the lands thereof restored to the United States, the court erred as follows:

*1st.* Because, as shown by the amended bill, the defendant is the owner of such interest in the land in suit as was granted to the Oregon Central Railroad Company by the act of Congress
58 approved May 4th 1870; which act granted *in præsenti* and immediately transferred unto the Oregon Central Railroad Company, a vested right to select the lands in suit, under direction of the Secretary of the Interior, in part satisfaction of the amount of land granted. As shown by the amended bill, the settlement of Elison was initiated in January, 1891, and his offer to file a homestead for the land was made within ninety days after July 27th 1893; both of which dates are long subsequent to the passage of defendant's granting act, definite location, construction, and acceptance of defendant's railroad.

*2nd.* Because, as shown by the plea, the Oregon Central Railroad Company's map of the survey and final location of its railroad, was duly accepted and approved by the Secretary of the Interior on May 17th 1871. Thereupon, on that day, the lands in suit were, by the terms and provisions of the said act segregated from the public lands, and have ever since so remained; hence the said lands were not public lands, nor subject to settlement by Elison, in January 1891, nor to homestead filing by him thereafter.

*3rd.* Because, as shown by the plea, at the time the defendant's land grant was made, and continuously since, all the odd sections of land within twenty-five miles of the defendant's railroad, undisposed of by the United States prior to the date of the said granting act, were and have been insufficient to make, or equal, the amount of lands granted. The lands in suit were, therefore, granted by the force and effect of the said act, without any selection thereof being required; hence the lands in suit were not public lands nor subject to the settlement, or filing, of Elison.

*4th.* Because, the said act provided that the lands in suit should be surveyed with all convenient speed, and patented as soon as the first twenty miles of the defendant's railroad was constructed and approved by the commissioners. The plea shows that the sec-
59 tion of road coterminous with the land in suit was finally approved on February 16th 1872; that the defendant thereupon, and continuously thereafter, demanded survey and patent; that the United States refused to permit selection of or issue patent for this land until after survey thereof; that the defendant would have selected the land on February 16th, 1872, if surveyed, or on the day of survey thereafter; but that the United States neglected and refused to select the same, until July 27th 1893. For these reasons it would be inequitable to restore to the United States title to the land in suit; as but for fault of the United States the defendant's patent would have issued long before Elison settled, or offered to file.

*5th.* Because, as shown by the bill, defendant's selection of the land in suit was filed and approved by the proper officers of the

United States, on July 27th 1893; hence Elison's filing, tendered thereafter, could not be lawfully received.

*6th.* Because, as shown by the bill and plea, the United States has no such interest in the relief prayed for, or given by the decree, as will maintain this suit, or sustain the decree.

*7th.* Because, as shown by the bill and plea, the decree should have been for defendant as prayed, with costs.

Wherefore the defendant (appellant) prays that the said decree be reversed; and that the circuit court of the United States for the district of Oregon be directed to enter a decree dismissing the said suit.

WM. D. FENTON &
WM. SINGER, JR.,
*Attorneys for the Appellant.*

WM. F. HERRIN,
*Counsel for the Appellant.*

(Endorsed:) Assignment of errors. Filed October 16, 1901, F. D. Monckton, clerk.

60 In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant,
*vs.*
UNITED STATES, Complainant and Appellee. } No. 639. In Equity.

*Bond on Appeal.*

We, N. T. Smith and J. H. Sharpe, both of the city and county of San Francisco, State of California, are held and firmly bound unto the United States of America, in the sum of five hundred (500) dollars, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The above-named defendant and appellant has been allowed an appeal to the Supreme Court of the United States, and a supersedeas, from the decree entered in the above-entitled court and cause on May 16th 1901; and the condition of this obligation is, that if the appellant shall prosecute its said appeal to effect, and answer all damages and costs if it fails to make its appeal good, then this obligation to be void; otherwise to remain in full force.

Dated, signed and sealed on October 15th 1901.

N. T. SMITH. [SEAL.]
J. H. SHARPE. [SEAL.]

61 Acknowledged before me on October 15th 1901.

[SEAL.] E. B. RYAN,
*Notary Public in and for the City and County of San Francisco, State of California.*

STATE OF CALIFORNIA, } ss:
*City and County of San Francisco,* }

N. T. Smith and J. H. Sharpe, being duly sworn, each for himself deposes and says: I am a householder in the northern district of California, and am worth the sum of five hundred (500) dollars, exclusive of property exempt from execution, and over and above my just debts and liabilities, in property within said district.

N. T. SMITH.
J. H. SHARPE.

Subscribed and sworn to before me on October 15th 1901.

[SEAL.] E. B. RYAN,
*Notary Public in and for the City and County of San Francisco, State of California.*

The foregoing bond is approved.

WM. W. MORROW, *Judge.*

(Endorsed:) Bond on appeal. Filed October 16, 1901, F. D. Monckton, clerk.

62 United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
*v.*
THE UNITED STATES, Appellee. } No. 639.

*Certificate of Clerk of C. C. A. to Transcript.*

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing sixty-one (61) pages, numbered from one (1) to sixty-one (61), inclusive, to be a true copy of the record, and of the assignment of errors, and of all proceedings in the above-entitled case as the same appear of record in my office, and that the same together constitute the transcript upon appeal to the Supreme Court of the United States herein.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 28th day of October, A. D. 1901.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

63 UNITED STATES OF AMERICA, ss:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on December 12th 1901, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the

ninth circuit, wherein The Oregon & California Railroad Company are appellants and The United States of America is appellee, to show cause, if any there be, why the decree rendered on May 16th, 1901, by the said United States circuit court of appeals against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand, at the city of San Francisco, on October 15th 1901.

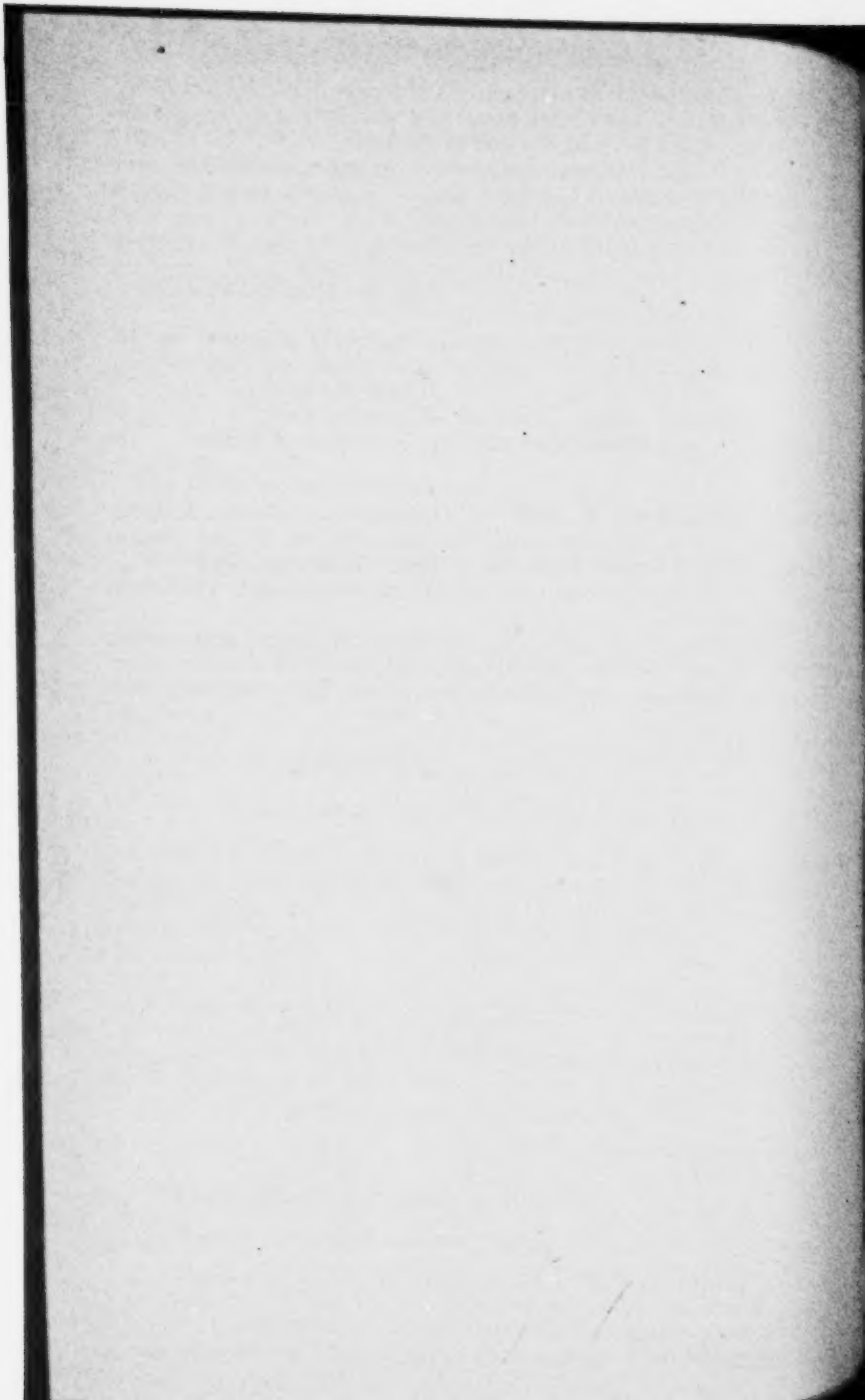
WM. W. MORROW, *Judge.*

Due service by copy of the foregoing citation is admitted on October 21st 1901.

JOHN H. HALL,
M.,
*United States Attorney for Oregon, of Counsel for the Appellee.*

64 [Endorsed:] No. 639. U.S. circuit court of appeals, ninth circuit. Oregon & Cal'a Railroad .Co. *vs.* United States. Citation. Filed October 23 1901. F. D. Monckton, clerk. Wm. Singer, Jr., N. E. corner Second and Mission streets, San Francisco, Cal. att'y for —

Endorsed on cover: File No. 18,309. U. S. C. C. of appeals, 9th circuit. Term No. 187. The Oregon and California Railroad Comdany, appellant, *vs.* The United States. Filed November 8th, 1901.



FILED
FEB 25 1903
JAMES H. McKENNEY,
Clerk.

FILE COPY

# Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 187.

OREGON AND CALIFORNIA RAILROAD COMPANY,
*Appellant,*

*against*

THE UNITED STATES,
*Appellee.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

# BRIEF IN BEHALF OF THE APPELLANT.

MAXWELL EVARTS,
*Of Counsel for the Appellant.*

S. C. Stanwood, Walker and Cedar Streets, N. Y.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 187.

OREGON AND CALIFORNIA RAILROAD COMPANY,
Appellant,

AGAINST

THE UNITED STATES,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

## BRIEF IN BEHALF OF THE APPELLANT.

### Statement.

By the Act of Congress, approved May 4, 1870, and entitled "An Act Granting Lands to aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinville, in the State of Oregon" (16 U. S.

Stat., 94), a grant of land was given to the Oregon Central Railroad Company to aid in the construction of a railroad and telegraph line from Portland to Astoria and from a suitable point or junction near Forest Grove to Yamkill River near McMinville, in the State of Oregon. This grant prescribed primary limits, ten alternate sections in width per mile on each side of the line of the road, and indemnity limits extending five miles beyond such primary limits (Record, p. 11).

The railroad from Portland to the Yamkill River, near McMinville, was completed June 23, 1876, as provided in said act of Congress (Record, p. 12).

By the second section of the act of May 4, 1870, it was specially provided as follows:

> "That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed."

The Oregon Central Railroad Company, and this appellant, the Oregon and California Railroad Company have ever since the completion of the railroad in 1876, demanded of the govern-

ment, the survey and patenting of the lands which they were entitled to under the grant given by said act of Congress (Record, p. 16).

On the sixth day of October, 1880, the Oregon Central Railroad Company sold and transferred to the appellant, the Oregon and California Railroad Company, all of its right, title and interest in and to the lands granted by the said act of Congress of May 4, 1870 (Record, p. 12), including the land in controversy which is part of Section 7, Township 2 South, Range 7 West, Willamette meridian (Record, p. 12).

Notwithstanding the demand of the railroad company for a survey of this land, the government delayed to file its official plat and survey thereof until July 27, 1893, more than fifteen years after the railroad was completed, and the company was ready and desirous of making a selection of the land (Record, p. 13).

All the odd sections within the indemnity limits of the grant to the railroad company were insufficient to make good the deficiency in the primary limits (Record, p. 16).

On the very day that the official plat and survey thereof was filed in the land office at Oregon City, Oregon, to wit, July 27, 1893, the Oregon

and California Railroad Company filed its selection indemnity list embracing the land in controversy (Record, p. 13), and thereafter and on October 19, 1895, a patent was duly issued to the railroad company therefor (Record, p. 14).

On the 12th day of January, 1891, Joseph H. Elison settled upon the land in dispute and continued to reside thereon and cultivated and improved the same. After the filing of the selection list by the company on July 27, 1893, and within ninety days therefrom, the said Ellison applied to the local land office at Oregon City, Oregon, for leave to file a homestead entry of the land occupied by him (Record, p. 13).

On November 3, 1897, the United States filed its bill in equity in the United States Circuit Court for the District of Oregon, seeking to set aside and cancel the patent from the United States of October 19, 1895, to the Oregon and California Railroad Company, and thereafter and on November 21, 1898, an amended bill of complaint was filed in said suit (Record, p. 10). To this amended bill, the defendant filed its plea (Record, p. 16), and on the 15th day of May, 1899, the case came on for hearing upon the bill of

complaint and the plea thereto, before the Honorable CHARLES B. BELLINGER, United States District Judge for the District of Oregon, who afterwards, and on the 27th day of April, 1901, entered an order overruling the plea and allowing the defendant time to further plead (Record, p. 19).

The defendant declined to further plead in the suit, and a final decree was entered on June 15, 1900, granting the prayer of the complainant, and setting aside and declaring null and void the patent theretofore issued by the United States to the Oregon and California Railroad Company on October 19, 1895 (Record, p. 21).

From said final decree an appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit, which on May 16, 1901, affirmed the judgment of the Court below (Record, p. 28). From the final decree of the United State Circuit Court of Appeals, this appeal has been taken (Record, p. 29).

## Specification of Errors.

The Circuit Court of Appeals erred:

I. In not reversing the decree of the Circuit Court entered herein on June 15, 1900, and

directing said Court to render a decree dismissing the bill of the United States.

II. In deciding that the United States was entitled to a decree vacating and setting aside the patent to the land in controversy issued to the Oregon and California Railroad Company, October 19, 1895.

III. In not deciding that the appellant, the Oregon and California Railroad Company was entitled to make the selection of the land in controversy and to receive a patent therefor, upon the ground that the status of such land, at the time of its selection, determined the right of the railroad thereto, and that at such time the land was public land of the United States, and then open to selection by the appellant under the grant of May 4, 1870.

IV. In not deciding that Elison who had come upon the land prior to the selection thereof by the appellant was a mere occupant and had no claim of any kind thereto.

V. In not deciding that the relative rights of the railroad company and the individual claimant were to be determined in favor of the former for the reason that it had first filed in the local land office the record evidence of its claim to the land in controversy.

**Argument.**

The main question in this suit is identical with the question arising in the case of Oregon and California Railroad Company vs. The United States, No. 186, October Term, 1902, which precedes upon the docket the appeal in this case, and we respectfully refer the Court to our brief in that case.

We, however, desire to urge upon the attention of the Court, an additional fact which is not found in Case No. 186. The granting acts in the two cases are different. In No. 186, it is the Act of Congress of July, 1866. In the case at bar, it is the Act of Congress of May 4, 1870 (See Appendix). This last act contains a provision which is not in the Act of 1866, and does not seem to be in the other Pacific Railroad acts. This provision is as follows:

> "That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed."

The railroad was completed June 23, 1876. The lands were not surveyed and the plat thereof filed in the local land office until July 27, 1893,

seventeen years thereafter, and this is so, notwithstanding the fact, that during that time, the railroad company constantly demanded the survey by the government (Record, p. 16). The United States agreed by the terms of its granting act to survey the lands along the line of road, *with all convenient speed.* Instead of this, it neglects and fails for twenty-three years to cause a survey thereof to be made, and declines to permit its grantee to make such selection without a survey. During this delay of twenty-three years and long prior to the occupancy of the land by Elison, the railroad continuously demanded the survey and patenting thereof. If the mere occupancy of land within the indemnity limits of a railroad grant, is to deprive the railroad from selecting it, and if the delay of the government in filing its surveys is to be unlimited in extent, although the statute requires that it shall file them with all convenient speed, then the grant of indemnity lands under the acts of Congress is a mere nullity, and the railroads will be stripped of the gift which Congress intended should aid them in constructing their lines of road.

MAXWELL EVARTS.
*Of Counsel for Appellant.*

# APPENDIX.

CHAP. LXIX.—*An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Portland to Astoria and McMinnville, in the State of Oregon.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamkill river, near McMinnville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side-tracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

SEC. 2. *And be it further enacted*, That the commissioner of the general land office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: *And provided also*, That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

SEC. 3. *And be it further enacted*, That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said *completed* [completed] sections.

SEC. 4. *And be it further enacted*, That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, side-tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

SEC. 5. *And be it futher enacted*, That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, side tracks, and wood yards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semiannually in coin not exceeding the [rate] of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the district court of the United States, concurrently with the State courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

SEC. 6. *And be it further enacted*, That the said company shall file with the Secretary of the Interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date.

Approved, May 4, 1870.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 3 1903
JAMES H. McKENNEY,
Clerk.

# In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, appellant,
*v.*
THE UNITED STATES. } No. 187.

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

## BRIEF FOR THE APPELLEES.

# In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, appellant,
*v.*
THE UNITED STATES. } No. 187.

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

## BRIEF FOR THE APPELLEES.

It seems unnecessary to write an extended brief in this case, reference being made to brief for appellees in No. 186.

It is pretended that this case differs from No. 186, because in the present case the granting act contained the following: "That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed."

There is nothing to show that they were not surveyed with all convenient speed. There is nothing to show, if that were material, that the company desired to have them surveyed, except the allegation (which we suppose is technically admitted) made in the plea in this case (Record, p. 16) that the company has "continuously demanded the survey and patenting thereof at all times since the railroad from Portland to McMinnville was accepted as aforesaid, and would have selected the same, as this defendant did, as soon as surveyed."

"Thereof" refers to the particular tract involved in the suit, and not to the lands generally or any particular part of them other than that tract.

What this allegation really refers to, unless it is to a mere effort to select prior to survey, is not clear. There is nothing to show that this demand or effort was accompanied by payment into the Treasury of "the cost of surveying, selecting, and conveying the same." Act of July 31, 1876 (19 Stat., 121.)

But this court takes notice of the difference between a suit by the United States essentially for the benefit of a homesteader or preemptioner and a suit by the United States essentially for its own benefit. (See *United States* v. *Beebe*, 127 U. S., 338.)

Doing so, the court considers whether the party substantially interested has or has not been guilty of laches, rather than whether the nominal party has or has not been.

If we concede that there should have been an earlier survey, this was certainly not the fault of the individual claimant, who could no more perfect his title than the company could make its selection before the filing of the plat of survey.

It would certainly be inequitable to deprive him of his home on the theory suggested, even if it were proven, as it is not, that the tract had not been surveyed with all convenient speed.

Respectfully submitted.

CHARLES W. RUSSELL,
*Special Assistant Attorney-General.*

O



# Supreme Court of the United States.

No. 187.—October Term, 1902.

| | |
|---|---|
| The Oregon and California Railroad Company, Appellant, *vs.* The United States. | Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. |

[April 6th 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

The controlling question in this case is whether the United States in 1893 erroneously issued to the Oregon and California Railroad Company, which succeeded to the rights of the Oregon Central Railroad Company, a patent for certain lands in Oregon.

These lands are without the place and within the indemnity limits of the grant made by the act of Congress of May 4th 1870, *c.* 69, granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville in the State of Oregon. 16 *Stat.* 94. The provisions of this act were substantially the same as those of the act of July 25th 1866, referred to in *Oregon and California Railroad Company* v. *United States*, case No. 186, just decided, except that the act of 1870 contains a provision not found in the act of 1866, to wit: "That the Commissioner of the General Land Office shall cause the land along the line of the said railroad to be surveyed with all convenient speed."

The line of the proposed road was definitely fixed and a plat thereof filed in the office of the Secretary of the Interior.

On the 16th day of February 1872 the first twenty miles of the contemplated railroad were completed from Portland to a point near Forest Grove, in Oregon, and on the 23d of June 1876 the road to the Yamhill River, near McMinnville, was completed, but it has never been constructed to Astoria, Oregon.

The final plat and survey of the township, in which the lands in dispute are situated, was not filed and approved until July 27th 1893; and on that day the company's list of selections of lands, which included the lands in question, were duly approved.

Prior to the year 1893, to wit, on the 12th day of January 1891, Joseph H. Elison, a duly qualified entryman under the laws of the United States, settled upon the lands in dispute with the intention in good faith of "homesteading the same," and since that date he has continuously resided upon,

cultivated and improved them; and within ninety days from the date of the filing of the township plat of survey he made application for "filing a homestead" covering these lands.

The selections by the company having been approved by the Land Department, a patent was issued to the Oregon and California Railroad Company on October 15th 1895. But it was issued without any knowledge at the time on the part of the Secretary or the General Land Office of the adverse claim of Elison, arising from his occupancy of the land.

For the reasons stated in the opinion just delivered in case No. 186, we hold that, in virtue of Elison's *bona fide* settlement upon the lands in dispute in 1891, with the intention, whenever the way was opened by a survey, to enter the lands under the homestead laws, his rights were superior to those acquired or that could have been acquired by the railroad company under any selection by it of indemnity lands made after the date of such settlement. The company's selection did not displace or defeat the right which the settler acquired by his settlement made previously in good faith with the intention to avail himself of the benefits of the homestead laws within due time after the lands were surveyed.

The railroad company rests its claim to have a superior right to these lands on the ground in part of long delay by the Commissioner of the Land Office in having them surveyed, although it frequently requested the survey to be made. There is nothing of substance in this contention. The statute, it is true, required the lands to be surveyed with all "convenient speed." But the question as to the precise time the lands should be surveyed was exclusively for the Land Office to determine; and it was to be determined with reference to all the facts and circumstances connected with the surveying of the public lands under the direction of the Land Department. We cannot say from the record that the Land Office, in the matter of the surveying of the particular lands here in dispute, did not act with convenient speed. Besides, the railroad company accepted the grant of Congress subject to the possibility of delay in the surveying, as well as to the power of the Land Office to determine when the lands should be surveyed. The action or non-action of the Land Department in such a matter cannot be controlled by the judiciary, unless perhaps in a case in which it appeared, beyond question, that its refusal to order the survey was merely arbitrary and without any real excuse. It may be that in such a case the Commissioner could be compelled by judicial process to discharge the duty imposed upon him by statute. But upon that point we need not express a decided opinion, for no such case is presented by the record before us. The allegation in the defendant's plea is simply that the Commissioner neglected to perform his duty in the matter of the surveying. But the facts constituting such alleged neglect are not stated. Besides, we may observe that since the right of the settler attached in virtue of his *bona fide*

occupancy of these lands before the railroad company made its selection, that right could not be displaced by reason of any delay or negligence upon the part of the Commissioner to cause a survey of the lands. The act contains no provision that requires a contrary view. The court must determine the rights of the settler according to the facts as they existed at the time his occupancy in good faith began. The statute does not otherwise declare. In that view, as already suggested, the settler's right was superior to any right acquired by the company, after the date of his occupancy, in virtue of its selection of these lands to supply a deficiency in the place limits.

Upon the authority of the case just decided, the decree of the Circuit Court of Appeals must be affirmed.

*And it is so ordered.*

True copy.

Test:

*Clerk Supreme Court, U. S.*